

# NCLC REPORTS

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### Developments and Ideas For the Practice of Consumer Law

#### Special Issue

- Class Action Bans and Arbitration Clauses

### The Rapidly Shifting Landscape in Challenges to Class Action Bans Embedded in Arbitration Clauses

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*In this article, Paul reviews recent developments and provides advice on one of the most significant areas of consumer litigation today—challenges to class action bans that apply not only to court but even to arbitration litigation. Overcoming such bans has a dual importance. Consumer rights in many situations cannot be vindicated if actions cannot be pursued on a classwide basis. Second, many corporations forcing consumers into arbitration fear class arbitration more than class actions in court. Mandatory arbitration may become less prevalent if corporations must weigh the possibility that arbitration will result in consumers proceeding on a classwide basis. Additional discussion and sample briefs relating to challenges to class arbitration bans are found in Consumer Arbitration Agreements (5<sup>th</sup> ed. 2007).*

### After Early Round Victories for Consumers, Corporations Ramp Up Their Defenses

As nearly all consumer lawyers already know, most corporations insert contract terms in their standard contracts which bar their customers from ever bringing or participating in a class action either in court or in arbitration. For example, nearly all cell phone carriers, credit card issuers, and car dealers selling new cars, have such provisions in their form contracts. These terms banning class actions are usually embedded within the part of standard form contracts that set out agreements to arbitrate, although the class bans always apply to class actions in any forum (court or arbitration).

The June 29, 2008, unanimous decision of the New Mexico Supreme Court in *Fiser v. Dell Corporation*<sup>1</sup> is the latest of a number of cases in the last two years where state supreme and appellate courts have struck down class action bans. Because most courts agree that state law governs whether a provision in an arbitration clause is unconscionable, an opti-

mistic soul might guess that this means that the battle over class action bans is being clearly won by consumers. In fact, such a guess would be premature and overly optimistic, as the battle continues to rage, with no clear outcome in sight.

First, a number of corporations have petitioned the U.S. Supreme Court for writs of *certiorari*, asking the Court to hold that the Federal Arbitration Act (FAA) preempts any state law that would ever strike down a class action ban embedded in an arbitration clause. In three cases this spring, the Supreme Court denied petitions for *certiorari*.<sup>2</sup> A number of other petitions are already pending, however, and more are likely to be filed. Accordingly, the situation at the U.S. Supreme Court bears close watching by any consumer advocate who wishes to challenge a class action ban.

Second, corporations have begun to embed choice-of-law clauses in their standard contracts that provide that any contract law disputes will be governed by the law of states that would enforce class action bans in all cases. The corporations' argument that courts in states that would strike down class action bans must ignore their own law, and instead apply the law of the state specified in the contract, has succeeded with some courts and been rejected by others. Consumer advocates should be familiar with the argument, and be prepared to strongly refute it.

Third, after being rejected by a large number of courts over a period of years, the corporate argument that the FAA preempts any limits that state law might place upon class action bans embedded in arbitration clauses has begun to be accepted in a few courts. Too many plaintiffs' lawyers have taken as a given that state law in this area is not preempted, and have failed to seriously brief and address the matter. As a few federal courts are embracing the corporate argument on this point, at least in dicta, consumer advocates need to know the best arguments to respond to this argument.

### The Recent Trend of State Courts Striking Down Class Action Bans

In the context of particular cases, where a ban on class actions serves as an exculpatory clause or "get out of jail free card," a number of courts have held that class action bans are unenforceable either because they are unconscionable, or because they violate a state's public policy by undermining state consumer protection or civil rights statutes. In some cases, this has led courts to invalidate the entire arbitration clause; in other cases, this has led courts to strike the class action ban but to send the case to arbitration without this provision.

<sup>1</sup> There is no citation available yet, but a copy of the case can be found at [www.consumerlaw.org/unreported](http://www.consumerlaw.org/unreported).

<sup>2</sup> *Laster v. T-Mobile USA, Inc.*, 252 Fed. Appx. 777 (9th Cir.), *cert. denied*, 128 S. Ct. 2500 (2008); *Gentry v. Superior Court* (Circuit City), 165 P.3d 556 (Cal.), *cert. denied*, 128 S. Ct. 1743 (2008); *Gratton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344 (Cal. Ct. App.), *cert. denied*, 128 S. Ct. 2501 (2008).

In early litigation, the majority of cases where plaintiffs brought this type of contract law challenge were not successful.<sup>3</sup> There were important exceptions even then,<sup>4</sup> and in recent years a growing number of state courts have struck down class action bans under these theories. For example, the high courts in California, New Jersey, New Mexico, and Washington, as well as the intermediate appellate courts in Missouri, Ohio, Oregon, Pennsylvania, and Wisconsin have all struck down class action bans in particular cases where they were deemed unconscionable because the bans were effectively exculpatory and/or because they were one-sided.<sup>5</sup>

When bringing an unconscionability challenge to a class action ban, build a strong factual record to support arguments that, without the ability to bring a class action, consumers will not be able to effectively vindicate their statutory rights. It is risky, to say the least, for parties to simply make assertions about the empirical question of when consumer lawyers would or would not handle a case on an individual basis. There are some notable cases where consumer advocates have set forth powerful evidentiary records in challenging class action bans, and other lawyers challenging such bans should consider following these examples. In one recent case, for example, a court struck down a class action ban after a two-day evidentiary hearing where the plaintiffs presented expert testimony that no consumer lawyer in the state would be able to handle a case of that sort on an individual basis.<sup>6</sup>

Similarly, in *Scott v. Cingular Wireless*, the Washington Supreme Court struck down a class action ban when testimony from consumer law experts was introduced and where discovery established that no consumers had arbitrated individual cases in the state against that defendant.<sup>7</sup> While many courts have struck down class action bans in cases where there was no such evidence presented, a plaintiff takes a big chance relying too heavily upon the court's experience and ideas, rather than setting out an evidentiary record.

## Choice-of-Law Clauses

In a blatant corporate "race to the bottom," a growing number of standard form contracts provide that any disputes under those contracts will be governed by the laws of states that corporations believe would generally enforce class action

bans, such as Texas or Utah. Extremely troubling is that quite a few federal district courts have gone along with this tactic, and utilize the contractually chosen state law to review the class action ban, even if the forum state's law might find the ban to be unconscionable.<sup>8</sup>

When faced with a contract that contains an unfavorable choice-of-law clause, most states follow the framework set out in the *Restatement (Second) of Conflict of Laws* § 187. A choice-of-law provision is invalid if: (a) the forum law would apply in the absence of a choice-of-law provision; (b) applying the other state's law would violate a "fundamental policy" of the forum state; and (c) the forum state has a greater interest than does the other state. The key test is whether it would violate a state's "fundamental public policy" to enforce the choice-of-law clause and replace the forum state's law (which, in states such as California or Washington would refuse to enforce an exculpatory ban on class actions), with the law of a state that would enforce all class action bans.

The New Mexico Supreme Court's decision in *Frier* is a leading example of a court rejecting the choice-of-law ploy. The court held that New Mexico had a fundamental state policy in favor of ensuring that individuals be able to enforce their rights under consumer laws, and "[t]herefore, application of Texas law, that would allow the class action ban, is contrary to New Mexico public policy."<sup>9</sup> Other courts have reached the same conclusion.<sup>10</sup>

## FAA Preemption

For a number of years, corporations have argued that the FAA preempts the application of any state law that would invalidate a class action ban that is embedded in an arbitration clause. In a long line of authority that stretches back more than a decade, the vast majority of courts have rejected this argument.<sup>11</sup> Among other indications that class action bans are not essential to arbitration (which is one of the premises of the pro-preemption position), several courts striking class action bans have nonetheless enforced the remainder of the arbitration clause and have left it to the arbi-

<sup>3</sup> *See, e.g.*, Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002); Strand v. U.S. Bank Nat'l Ass'n, ND, 693 N.W.2d 918 (N.D. 2005); Walther v. Sovereign Bank, 386 Md. 412, 872 A.2d 735 (Md. 2005); Forrest v. Verizon Communications, Inc., 805 A.2d 1007 (D.C. Ct. App. 2002).

<sup>4</sup> *See, e.g.*, Ting v. AT&T 319 F. 3d 1126 (9th Cir. 2003); Leonard v. Terminix Intern. Co., 854 So. 2d 529 (Ala. 2002).

<sup>5</sup> Discover Bank v. Super. Ct. (Boehr), 113 P.3d 1100 (Cal. 2005); Kinkel v. Cingular Wireless, L.L.C., 857 N.E.2d 250 (Ill. 2006); Whitney v. Alltel, 173 S.W.3d 300 (Mo. Ct. App. 2005); Muhammad v. County Bank of Rehoboth Beach, Delaware, 912 A.2d 88 (N.J. 2006); Fiser v. Dell Corp. (N.M. June 29), available at [www.consumerlaw.org/unreported](http://www.consumerlaw.org/unreported); Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161 (Ohio Ct. App. 2004); Vasquez-Lopez v. Beneficial Oregon, 152 P.3d 940 (Or. Ct. App. 2007); Thibodeau v. Comcast Corp., 912 A.2d 874 (Pa. Super. Ct. 2006); Scott v. Cingular Wireless, 161 P.3d 1000 (Wash. 2007); Cady v. Cross Country Bank, 299 Wis. 2d 420 (Ct. App. 2007). Cf. S.D.S. Autos, Inc. v. Chrzanzowski, et al., 2007 WL 4145222 (Fla. Ct. App. Nov. 26, 2007) (ban unconscionable because it "deprive[s] the plaintiff of the ability to obtain meaningful relief for alleged statutory violations").

<sup>6</sup> Reuter v. Davis, 2006 WL 3743016 (Fla. Cir. Ct. Dec. 12, 2006). Examples of affidavits and evidence that can be employed in such challenges are available at [www.publicjustice.net](http://www.publicjustice.net), on the page "Legal Briefs and Documents," under the heading of "Class action bans."

<sup>7</sup> *Scott*, 163 P.3d 1000.

<sup>8</sup> *E.g.*, Homa v. American Express, 496 F. Supp. 2d 440 (D.N.J. 2007) (currently on appeal to the Third Circuit) (the author is one of the counsels for the plaintiffs in the appeal, and the briefs for the consumer are available at [www.publicjustice.net](http://www.publicjustice.net)); Halprin v. Verizon Wireless Services, L.L.C., 2008 WL 961239 (D.N.J. Apr. 8, 2008) (enforcing class action ban, enforcing choice-of-law clause specifying Virginia law); Ormstead v. Dell, Inc., 2008 WL 341099 (N.D. Cal. Feb. 5, 2008) (enforcing class action ban, enforcing choice-of-law clause specifying Texas law); Extras-Lenox v. Assurant, Inc., 2008 WL 114889 (W.D. Ky. 2008) (enforcing class action ban, enforcing choice-of-law clause specifying South Dakota law).

<sup>9</sup> Slip Op. at 10.

<sup>10</sup> *E.g.*, Oestreicher v. Alienware Corp., 2007 WL 2302490 (N.D. Cal. Aug. 10, 2007) (currently on appeal to the Ninth Circuit); Klussman v. Cross Country Bank, 36 Cal. Rptr. 3d 728 (Cal. Ct. App. 2005); Wiggington v. Dell, Inc., 2008 WL 2267173 (Ill. Ct. App. June 2, 2008).

<sup>11</sup> *See, e.g.*, Dale v. Comcast Corp., 498 F.3d 1216 (11th Cir. 2007) ("we look to state law to determine whether a provision in a contract is enforceable"); Shroyer v. New Cingular Wireless, 498 F.3d 976, 988 (9th Cir. 2007) ("the principle that class action waivers are under certain circumstances unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally"); Kinkel, 857 N.E.2d at 263 (the "FAA neither expressly nor implicitly preempts a state court from holding that an arbitration clause or a specific provision within an arbitration clause is unenforceable"); Muhammad, 912 A.2d at 94 (the FAA "does not preclude an examination into whether the arbitration agreement at issue is unconscionable under state law"); *Scott*, 161 P.3d at 1008 ("striking a class action waiver in an arbitration clause does not violate the FAA" because "the FAA favors arbitration, not exculpatory").

trator to determine if the case should proceed on a class or an individual basis.<sup>12</sup>

Corporate defendants have recently won at least two significant battles on this front, however, and the issue calls out for more thorough briefing than many plaintiffs have given it in the past. In *West Virginia* for example, in 2003 the state supreme court handed down a landmark decision striking down a ban on class actions.<sup>13</sup> In 2005, however, a single federal district judge disregarded the lengthy and thoughtful decision of the state Supreme Court and indicated in conclusory dicta that the FAA preempts *West Virginia* high court's ruling.<sup>14</sup> In the wake of this decision, and the fact that nearly all class actions are now litigated in federal court after enactment of the Class Action Fairness Act, the status of class action bans in *West Virginia* is not clear.

Similarly, a major victory for consumers in Pennsylvania was implemented late in 2007 when the Third Circuit suggested in dicta in *Gay v. Creditreform* that at least some state laws limiting class action bans may be preempted by the FAA.<sup>15</sup> The FAA preemption language in *Gay* is largely premised on confusion and some incorrect assumptions about state and federal law. For example, the *Gay* court was under the misimpression that there can be no class actions in arbitration.<sup>16</sup> In 2003, however, the U.S. Supreme Court made clear that class actions may proceed in the arbitral forum.<sup>17</sup>

### Consumers Have Powerful Arguments Why the FAA Does Not Preempt State Law Limiting Exculpatory Clauses

Hopefully, if the preemption issue is briefed thoroughly and powerfully in future cases, few courts will follow *Gay*'s FAA preemption dicta. Consumer advocates should be able to powerfully argue that state laws striking down contract terms embedded in arbitration clauses that are exculpatory in nature are entirely consistent with the U.S. Supreme Court's own decisions. The Court has directed that arbitration clauses are enforceable under the FAA only if they permit claimants to effectively enforce their rights.<sup>18</sup> The Court has recognized, for example, that "the existence of large arbitration costs may well preclude a litigant . . . from effectively vindicating [his] rights," and that this would not be permissible.<sup>19</sup> While the Supreme Court has acknowledged that arbitral forums may have somewhat different and simplified rules from court rules, the Court has insisted that arbitration must permit a party to "effectively vindicate" statutory rights.<sup>20</sup>

An argument that the FAA preempts all state laws that limit class action bans is also inconsistent with the basic rule that the FAA only preempts state laws that conflict with it. The U.S. Supreme Court has held that the FAA has no ex-

press preemption provision, and does not reflect Congress's intent to occupy the entire field of arbitration or contract law.<sup>21</sup> There is no plausible argument that state laws limiting class action bans that are exculpatory conflicts with the FAA's purposes. As the Supreme Court has made clear in a variety of contexts, a federal law does not impliedly preempt a body of state law where the federal law *says nothing about the subject*. Where federal law is silent on a subject, there is no implied conflict preemption of state law based on frustration of federal policy.<sup>22</sup> In the class action context, the FAA says nothing one way or the other on the subject, in part, because the FAA was passed in 1924, long before class actions existed). Finally, a sweeping preemption rule in this context is counter to the Supreme Court's directions that generally applicable rules of contract law apply to arbitration clauses just as they do to any other contract term.<sup>23</sup> If a state's laws would normally enforce exculpatory clauses that strip individuals of their rights under consumer protection and civil rights statutes, then the FAA would preempt the state from striking contract terms embedded in arbitration clauses that did the same thing. In most states, however, the rule is to the contrary.

### Cite Your State's Law in Challenging Exculpatory Clauses

This does raise an important practice point, however: to effectively challenge class action bans that are exculpatory, plaintiffs need to demonstrate that they are relying upon a general body of state contract law forbidding exculpatory clauses in such circumstances. Plaintiffs who fail to do basic contract law research in their state and rely upon cases from other jurisdictions that involve challenges to arbitration clauses may make a grave error in advocacy—their arguments need to be grounded in the contract law of the state whose law governs, not in generalizations about arbitration clauses.

### Gay Is Not Only Wrong, but Distinguishable

Even if one begins with the assumption that the *Gay* decision's dicta about preemption is correct, however, it should be possible to distinguish this dicta from cases pending in other states, because of a strange quirk in the decision. The dicta relating to FAA preemption in *Gay* was based upon an interpretation of Pennsylvania contract law (arguably a misinterpretation of Pennsylvania law), that differs enormously from the contract law of most other states.

In particular, the Third Circuit interpreted Pennsylvania law as prohibiting any provision in an arbitration clause that would not permit a party to bring a class action in *court*. If it were true that Pennsylvania law insisted that parties have a right to a judicial class action, the Third Circuit would almost certainly be correct that this law was preempted.

Even if that is an accurate description of Pennsylvania law, however, most courts striking class action bans in particular cases have been very clear that their decisions are not based in an insistence upon judicial proceedings (as opposed to arbitration), but rather are based upon the rule that no

<sup>12</sup> *E.g., Muhammad*, 912 A.2d 88; *Reuter*, 2006 WL 3743016.

<sup>13</sup> *Dunlap v. Friedman's, Inc.*, 582 S.E.2d 841 (W. Va. 2003).

<sup>14</sup> *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685 (N.D. W. Va. 2005).

<sup>15</sup> *Gay v. Creditreform*, 511 F.3d 369 (3d Cir. 2007).

<sup>16</sup> This argument is developed in much greater detail in the Petition for Re-hearing filed in *Gay*, which can be found at [www.publicjustice.net](http://www.publicjustice.net). It should be noted, however, that this petition was not successful.

<sup>17</sup> See *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).

<sup>18</sup> See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

<sup>19</sup> "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum" (citation omitted).

<sup>20</sup> *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 81 (2000).

<sup>21</sup> See, e.g., *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002).

<sup>21</sup> Volt Info. Sciences, Inc. v. Bd. of Trustees of Stanford Univ., 489 U.S. 468, 477 (1989).

<sup>22</sup> Cf. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289–290 (1995) ("[a] finding of liability against petitioners would undermine no objectives or purposes with respect to ABS devices since none exist").

<sup>23</sup> See *Doctor's Assoc's, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 9 U.S.C. § 2").

contract term (in an arbitration clause or otherwise) may bar individuals from effectively vindicating their rights under consumer protection and civil rights statutes.<sup>24</sup>

## Practice Pointers for Consumer Litigants Challenging Class Action Bans

Corporations often try to use class action bans to insulate themselves from all liability for certain types of wrongdoing. Many jurisdictions have rejected these efforts, but corporations are tirelessly looking for end-runs to these pro-consumer decisions. Advocates for consumers need to be alert to all the developments in this rapidly evolving area of law, and to make cutting-edge arguments.

First, consumer advocates need to base their arguments on sound factual records that recognize that class action bans are more likely to be held unenforceable where courts are presented with strong factual records establishing that in that particular cases a class action ban will prevent individuals from effectively vindicating their statutory rights.

Second, consumer advocates need to be able to make up-to-date and well supported legal arguments against ploys such as sweeping choice-of-law clauses and overly broad theories of federal preemption. Fighting class action bans has been a little like playing whack-a-mole: even when a state supreme court strikes them down in one place, the corporate world tinkers with things and the class action bans pop back up in a new and different way. Consumer lawyers need to be swift and sure in their counter-responses.

<sup>24</sup> See, e.g., *Mulammad*, 912 A.2d. 88 (striking the class action ban, and then sending the case to arbitration, with the arbitrator to decide if the case should proceed on a class action or individual basis). One court has already distinguished *Goy* on this basis. See *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 n.3 (9th Cir. 2008) (“[u]nlike the Third Circuit’s conclusion as to the applicable state law in *Goy*, we determine that the Washington Supreme Court in *Swart* does not hold that an agreement to arbitrate may be unenforceable simply because it is an agreement to arbitrate.”).

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